DOCKET FILE COPY ORIGINAL
RECEIVED
MAY 13 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-In-Billing and Billing Format	)	CC Docket No. 98-170

REPLY COMMENTS OF AOL TIME WARNER INC.

AOL Time Warner Inc., by its counsel, files these Reply Comments in the above-captioned rulemaking proceeding designed to reform the current universal service fund ("USF") collection mechanism and carrier practices regarding pass-through of the costs of USF onto the carrier's customers.[1] As described more fully herein, the FCC should not use this proceeding to reverse its regulatory course by expanding regulation to require Internet Service Providers

---

[1] *See In the Matter of Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, et al., FCC 02-43 (rel. Feb. 26, 2002) ("FNPRM").

("ISPs") to contribute directly to USF. Such action would contravene the express mandate of Section 254 of the Communications Act, whereby only telecommunications service providers and other providers of telecommunications may be required to contribute to USF.[2] In addition, expanding the scope of USF in this fashion would impose an unwarranted burden upon ISPs, ignoring the enormous indirect contribution made by ISPs and other information service providers as they spend increasing amounts to acquire telecommunications services and inputs.

INTRODUCTION AND SUMMARY

As described in its initial comments, AOL Time Warner depends on a variety of wireline and wireless telecommunications inputs subject to USF when delivering its services and content to the American consumer. As a customer of telecommunications and telecommunications services, AOL Time Warner indirectly bears USF charges in the form of carrier and other contributor pass-throughs of USF charges. Ultimately, these charges are borne by the consumers of AOL Time Warner's products in the form of increased production costs or higher charges for products and services.[3]

While numerous commenting parties echo in substantial respect many of the concerns raised by AOL Time Warner regarding the proposed contribution reform methodology,[4] some parties also urge the FCC to adopt a contribution proposal that would require the Commission to revisit and reverse its time-tested conclusion that ISPs are not properly direct contributors to the

---

[2] 47 U.S.C. § 254(d).

[3] *See* Comments of AOL Time Warner Inc. (filed April 22, 2002).

[4] *See e.g.*, Comments of California Public Utilities Commission at 11-12; Comments of General Services Administration at 6-9; Comments of Time Warner Telecom, XO Communications and Allegiance Telecom at 4, 13-16.

USF regime.[5] The FCC must reject these calls. Section 254(d) of the Communications Act expressly provides that only interstate telecommunications carriers and other providers of telecommunications are within the class of direct USF contributors.[6] As the FCC has correctly – and repeatedly – concluded, because ISPs are neither carriers nor other providers of interstate telecommunications, USF obligations cannot be extended to them.

In addition, the FCC has also repeatedly stressed that ISPs, while not required to make direct contributions to USF, contribute significant amounts indirectly, through their large purchases of telecommunications and telecommunications services.[7] Moreover, as AOL Time Warner has explained in its comments in a related FCC proceeding, and the FCC has stressed in its decisions, the framework whereby ISPs are users of telecommunications (and not providers) has redounded to the substantial benefit of the American public, stimulating growth and productivity for carriers, customers and ISPs.[8]

The FCC should not use this proceeding as a back-door means to re-visit settled telecommunications issues. The FCC has fully considered whether ISPs should be regulated like telecommunications carriers and subject to USF contribution requirements; whether interstate carrier access or similar charges should be imposed upon ISPs and other information service

---

[5] *See e.g.*, Comments of SBC Communications Inc. at 7-9; Comments of BellSouth at 4. Together, SBC and BellSouth advocate a "Joint Proposal" that proposes to include "ISPs and other content providers in the contribution mechanism" on the grounds that these entities provide interstate telecommunications to its end users, even if they are not facilities-based. Comments of SBC at 8-9.

[6] 47 U.S.C. § 254(d); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 788 (1997); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶¶ 32, 66-72, 134 (1998) ("*Report to Congress*").

[7] *See Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, FCC No. 98-85, Report to Congress, 13 FCC Rcd 11810 at ¶ 22 (1998) ("*Second Report to Congress*").

[8] *See* Comments of AOL Time Warner Inc., Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10; FCC No. 02-42, rel. Feb. 15, 2002, filed May 3, 2002 at 21-24. *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket 98-147, 14 FCC Rcd 19237 at ¶ 3.

providers; and whether the telecommunications service/information service distinction is sound policy. Indeed, the FCC has already concluded several times, based upon voluminous records, that ISPs, as well as their customers, pay fully for the telecommunications services they use.[9] Arguments that providers of advanced information services are somehow getting a "free-ride" unless they are required to contribute directly to the universal service funding mechanism have been wisely rejected in the past. If it is necessary for the Commission to consider these recycled arguments in this proceeding, then the FCC should, once again, reject them. Instead of expanding regulation, the FCC should heed the objectives it delineated in the FNPRM: to review the USF contribution methodology to ensure that USF is sustainable, specific and predictable.

DISCUSSION

I. THE COMMUNICATIONS ACT LIMITS CONTRIBUTORS TO INTERSTATE TELECOMMUNICATIONS CARRIERS AND OTHER PROVIDERS OF INTERSTATE TELECOMMUNICATIONS

The FCC should disregard attempts by some parties to turn this proceeding into a broad, far-ranging reexamination of the regulatory treatment of ISPs and other information service providers, especially since the Commission has already sought comments on related issues in other extant dockets.[10] Instead, the Commission should focus here on how best to implement its statutory directive of ensuring a USF that is specific, predictable and sufficient. As a consumer-

---

[9] *See, e.g., Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing and End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15,982 at ¶ 346 (1997) ("*Access Charge Reform Order*").

[10] *See e.g., In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, rel. March 22, 2002 ("*Broadband Wireline NPRM*""); *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, rel. Dec. 20, 2001 ("*Dominant/Non-Dominant NPRM*");*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 001-361, rel. Dec. 20, 2001.

oriented company, AOL Time Warner recognizes the need to ensure that telecommunications services are ubiquitous and affordable to all, including consumers in high-cost and rural areas. To do so, the FCC must heed the statute rather than expand regulation as suggested.

In their comments, BellSouth and SBC urge the FCC to conclude that "it is more appropriate to treat ISPs like IXCs, rather than end users, for universal service purposes."[11] This argument should be rejected for two reasons. First, Section 254 (d) of the Communications Act clearly defines the entities that may be universal service contributors within the framework established by Congress in the Telecommunications Act of 1996 ("1996 Act"). These include mandatory contributions from "every telecommunications carrier that provides interstate telecommunications services" and permissive contributions from "any other provider of interstate telecommunications...if the public interest so requires." As the FCC has repeatedly held, ISPs, while providing information services *via telecommunications*,[12] do not provide telecommunications.[13] Indeed, the Commission has rejected before the very arguments SBC and BellSouth now try to pass off in this proceeding – that ISPs are really like IXCs.[14] This is not the

---

[11] Comments of SBC at 8.

[12] "Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. §153(20).

[13] *Report to Congress* at ¶¶81-82; *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 788 (1997) (ISPs "are not required to contribute to support mechanisms to the extent they provide such services").

[14] *See e.g., Access Charge Reform Order*, 12 FCC Rcd. at ¶ 344 (1997) ("it is not clear that ISPs use the public switched network in a manner analogous to IXCs"), *aff'd*, Southwestern Bell Tel.Co. v. FCC, 153 F.3d 523, 542 (8th Cir. 1998) ("the Commission's actions do not discriminate in favor of ISPs, which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges").

result of some "loophole" as urged here,[15] but rather a well-reasoned determination consistent with the statute and sound policy.

Second, the FCC has wisely recognized that the distinction between providers of telecommunications and information service providers offers significant public interest benefits.[16] Indeed, the Commission has stressed that it is cognizant of the "negative policy consequences of a conclusion that Internet access services should be classified as 'telecommunications.'"[17] In connection with the Commission's review of its broadband regulatory framework, AOL Time Warner has detailed the tremendous benefits that have accrued to the American public as a result of these forward-looking policies.[18] As such, while AOL Time Warner agrees that the FCC should consider USF reform to ensure that the contribution mechanism and related carrier-recovery practices serve the public interest, it should reject any proposal that would seek to redefine ISPs as within the class of contributors envisioned by the 1996 Act.

---

[15] Comments of BellSouth at 4.

[16] Since 1980, in its seminal *Computer Inquiries*, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) ("Computer II") (subsequent history omitted); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Computer III") (subsequent history omitted), the FCC has consistently reaffirmed the wisdom of the basic/enhanced regulatory dichotomy. This regime, codified in the 1996 Act through the definitions of "telecommunications," "telecommunications services" and "information services," has served the public interest well. "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43). "Telecommunications service" is the offering of telecommunications for a fee directly to the public; and a "telecommunications carrier" is any provider of telecommunications services. Id. §§ 153(46), (44). Under present law, all "enhanced services" are by definition "information services." *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, at ¶ 102 (1996) ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'").

[17] *Report to Congress* at ¶82.

[18] *See* Comments of AOL Time Warner, *Broadband Wireline NPRM* at 21-24; Reply Comments of AOL Time Warner *Dominant/Non-Dominant NPRM* at 5-9.

II. ISPs AND OTHER INFORMATION SERVICES PROVIDERS ALREADY CONTRIBUTE INDIRECTLY TO USF

As the FCC has recognized in the many stages of its ongoing proceedings to implement the statutory universal service directives, its decisions to reject calls to classify ISPs as telecommunications carriers in order to require ISPs to contribute directly into the USF has not meant that information services providers will unfairly avoid paying their share of universal service costs or somehow otherwise escape a burden.[19] Indeed, the FCC has underscored that universal service contributions are already made for telecommunications services involved in the provision of Internet access and other advanced, information services.[20] The Commission has expressly held that:

> Information service providers, which are not obligated by statute to contribute, will make no direct contribution; information service providers, however, will contribute significant amounts indirectly, as high-volume purchasers of telecommunications, as explained in the Commission's *April 10th Report*.[21]

In fact, not only is the evidence regarding ISPs' indirect USF contributions just as probative today, payments to entities offering telecommunications services to ISPs, including to incumbent and competitive local exchange carriers, interexchange carriers and others continue to

---

[19] *See Second Report to Congress* at ¶¶ 22. *See also,* Comments of AOL, CC Docket 96-45, *In the Matter of Federal-State Joint Board on Universal* Service, at 17 (filed January 26, 1998); *see also, e.g.*, Comments of the Internet Access Coalition, at 14-15 (filed January 26, 1998), Comments of WorldCom, at 8-9 (filed January 26, 1998); Comments of ITIS and ITAA, at 8-9 (filed January 26, 1998); Comments of the Commercial Internet Exchange, at 10-11 (filed January 26, 1998).

[20] *See "Quantifying the Contribution: Estimates of Telecommunications Services Expenditures Attributable to Online Service Production and Consumption,"* Prof. Jeffrey K. Mackie-Mason, Department of Economics and School of Information, University of Michigan, May 1998 (filed May 6, 1998) (provided to Chairman William Kennard, Commissioner Michael Powell, Commissioner Gloria Tristani, Commissioner Susan Ness, and Commissioner Harold Furchtgott-Roth).

[21] *Second Report to Congress, supra,* at ¶22 (footnotes omitted).

increase as ISPs utilize more and more telecommunications services. As AOL Time Warner noted in its initial comments, sometimes these payments include express USF pass-throughs and in other instances, the rates implicitly reflect the universal service contributions of the entities from which service is being acquired.[22]

In addition to adjustments in telecommunications service rates directly attributable to universal service contributions, ISPs and their customers have driven increased telecommunications service revenues, expanding the contribution base.[23] Given that ISPs, other information service providers, and their customers already pay their fair share of universal service costs – and by some accounts *more* than their fair share[24] – the FCC should find that proposals to single out here ISPs among all users of interstate telecommunications are discriminatory and unnecessary.[25] The FCC should therefore reject arguments that ISPs are somehow escaping USF obligations through a "loophole" as factually and economically incorrect.

---

[22] Comments of AOL Time Warner at 2.

[23] *See e.g.*, Lee L. Selwyn and Joseph W. Laszlo, Economics and Technology, Inc., "*The Effect of Internet Use on the Nation's Telephone Network*," Jan. 22, 1997.

[24] As explained in AOL Time Warner's initial comments, the Commission should make clear that carriers may not in effect use USF to raise their rates. As such, the Commission should cap carrier USF pass-throughs. Comments of AOL Time Warner at 4-7.

[25] *See Central Railroad Co. v. Commonwealth of Pa.*, 370 U.S. 607, 612 (1962) (stating that "multiple taxation" of interstate operations offends the Commerce Clause), quoted in *Cable Television User Tax*, 50 FCC 2d 540, 552 (1975) (Comm'r Glen O. Robinson, dissenting).

CONCLUSION

AOL Time Warner reiterates that FCC review of USF is timely and necessary. As such, the Commission should undertake a careful analysis of current and proposed USF contribution mechanisms and carrier pass-through practices to ensure that USF money is collected and allocated in a fair and reasonable manner. In so doing, the FCC should reject calls to expand regulation by imposing USF contribution obligations on ISPs in contravention of the Communications Act.

Respectfully submitted,

Steven N. Teplitz
Vice President and Associate General Counsel
AOL Time Warner Inc.
800 Connecticut Avenue, N.W.
Washington, D.C. 20006

Donna N. Lampert
Mark J. O'Connor
Lampert & O'Connor, P.C.
1750 K Street, N.W.
Suite 600
Washington, D.C. 20006

Date: May 13, 2002

Certificate of Service

I, Sybil Anne Strimbu, state that copies of the foregoing "Reply Comments of AOL Time Warner Inc." were delivered by hand this day, May, 13, 2002, to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Dorothy Attwood
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeff Carlisle
Sr. Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Mattey
Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Brent Olson
Deputy Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Katherine Schroder
Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Eric Einhorn
Deputy Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christopher Libertelli
Special Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jessica Rosenworcel
Legal Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Cathy Carpino
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Garnett
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Diane Law Hsu
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Marsha J. MacBride
Chief of Staff
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle D. Dixon
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert Pepper
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Common Carrier Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Sr. Legal Advisor
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dan Gonzalez
Sr. Legal Advisor
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sheryl Todd
Accounting Policy Division
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Portals II
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

Sybil Anne Strimbu

Sybil Anne Strimbu